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Conference

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 RIO TINTO,

4 Plaintiff,

5 v.

14 CV 3042 (RMB)

6 VALE, S.A., et al.,

7 Defendants.

8 -----x

9 January 20, 2015
10:45 a.m.

11 Before:

12 HON. RICHARD M. BERMAN,

District Judge

13 APPEARANCES

14 QUINN EMMANUEL URQUHART & SULLIVAN, LLP

15 Attorneys for Plaintiff

16 BY: ERIC C. LYTTLE

MICHAEL J. LYLE

17 CLEARY GOTTlieb

Attorneys for Defendant Vale, S.A.

18 BY: JONATHAN BLACKMAN

19 MISHCONDE REYA NY LLP

Attorneys for Defendant BSG

20 BY: VINCENT FILARDO, JR.

21 SULLIVAN & WORCESTER

Attorneys for Defendant Thiam

22 BY: PAUL SUMMIT

23 LAW OFFICES OF MARTIN AUERBACH

Attorneys for Defendant VBG

24 BY: MARTIN AUERBACH

1 THE COURT: So we do not have a huge amount to talk
2 about today.

3 In the order that I issued on Friday, I tried to
4 clarify my approach to discovery and the remainder of this
5 case. And I have some further dates for you today, and they
6 are these. So I would be looking at a trial, if there were one
7 in this case, to commence on or about March 14th, 2016.
8 Working backwards, a final pretrial conference on March 1st,
9 2016, and working yet further backwards by January 15th, 2016,
10 I would be looking for submission of civil pretrial documents,
11 including a joint pretrial order, joint jury instructions,
12 joint proposed voir dire questions if anybody had any, joint
13 verdict sheet, and motions in limine. If there were opposition
14 to any of the motions in limine, they would be due on
15 January 29, 2016, and that would be that.

16 So I just wanted to set forth the entire schedule for
17 the case and give you some parameters in which to move forward.
18 So if anybody had any questions, I'm happy to take them.

19 MR. BLACKMAN: Your Honor, Jonathan Blackman from
20 Cleary Gottlieb representing Vale. And I convey Mr. Lyman's
21 regrets. He had a conference moved, he was already committed
22 to another matter.

23 THE COURT: No problem.

24 MR. BLACKMAN: He's not fleeing the jurisdiction
25 because of the last argument. He wishes he were here.

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1 I had two points.

2 THE COURT: I'm sorry to feel guilty.

3 MR. BLACKMAN: I didn't mean to make you feel guilty.

4 THE COURT: No, no. I know, I know.

5 MR. BLACKMAN: I had two points, one which I came
6 prepared to speak to, and one raised by the schedule that your
7 Honor just gave us.

8 On the motion to dismiss, we took to heart the Court's
9 previous direction in your memo endorsement of January 8th.

10 THE COURT: The more is less, more is less
11 endorsement?

12 MR. BLACKMAN: Less is more. We agree with that. And
13 more, conversely, is less. And we have been really working
14 hard, and it is hard because these defendants not only have
15 different arguments and different view points, but in fact are
16 adverse to each other in many respects, to shrink it down. But
17 we really would ask the Court if you could modify your ruling
18 to give us 35 pages.

19 THE COURT: I think that it's good to go the way it
20 is. I've given you that extra 12 page affidavit to work with.
21 So maybe in there you can -- I'm certainly not trying to
22 curtail anybody's position or point of view. But my experience
23 invariably has been that -- and I acknowledge that some issue,
24 some parties are somewhat adverse to others -- but in these
25 motions, there's more common ground than anything else. That

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1 was certainly true in the forum nonconvenience, for example.
2 So the forum selection had some specific twist to it perhaps,
3 but there's far more commonality. So I think we can do it,
4 actually, within the confines of these limitations.

5 MR. BLACKMAN: If I could just make one plea to that.
6 I mean the jurisdictional part, a lot can probably can go into
7 affidavits.

8 THE COURT: That's what I was thinking.

9 MR. BLACKMAN: But we really can't make legal
10 arguments in an affidavit. This is not, you know, the Court
11 across the street.

12 THE COURT: Right, I get that.

13 MR. BLACKMAN: We have to use a brief.

14 THE COURT: No, I get it. The idea was that if there
15 were any factual, you know, differences or perspectives that
16 might be tucked into that.

17 MR. BLACKMAN: The problem is just on the 12(b)(6)
18 motion, first there's a limitation section. And the main
19 issue -- because we're far along in drafting -- is whether
20 there has been fraudulent concealment. And the law in this
21 Circuit is that has to be decided by defendant by defendant.
22 So, you know, even if we have, you know, a page each, you know,
23 that's four pages to deal with that issue.

24 Similarly, the elements of the RICO claim. We have,
25 indeed, jointly briefed. We're already drafting it, issues

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1 about enterprise, closed in, continuity, open ended. Those are
2 common. But then when we get to the specific defendants,
3 whether predicate acts have been pleaded, you know, for each
4 defendant is, again, a defendant issue. And we just would
5 really, you know -- the affidavits may deal with a lot of the
6 jurisdictional part, but on the 12(b)(6) if we could just
7 have --

8 THE COURT: Okay, why don't we say 30 pages.

9 MR. BLACKMAN: Okay. Thank you, your Honor.

10 THE COURT: On that.

11 MR. BLACKMAN: The other point --

12 THE COURT: That would be true also of the response.

13 MR. LYLE: Thank you, your Honor.

14 MR. BLACKMAN: As far as the schedule, the schedule
15 the Court has approved previously in your January 16th order
16 has expert discovery completed on February 29, and now set a
17 final pretrial on March 1 and the trial on March 14th. That
18 really leaves no time for summary judgment motion.

19 THE COURT: So, you know, the dates said no later
20 than. So there's no prohibition for you all doing it earlier.
21 But, second, so the issue of summary judgment is always -- not
22 always -- is often presented here in court as it is now, as a
23 foregone conclusion. And, you know, you haven't even done any
24 discovery yet. So good faith, who knows if there is even a
25 viable summary judgment motion here.

1 And, you know, summary judgment is always a high
2 hurdle, but -- so when parties come in the big cases, and in
3 particular they always say, well, Judge, of course there's
4 going to be summary judgment motion. But maybe there isn't.
5 Or if there is a viable summary judgment motion, you would
6 spell that out in your premotion letter and we could tuck it
7 into the motion in limine practice, it seems to me, so.

8 MR. BLACKMAN: Okay, that --

9 THE COURT: No one would ever preclude you from making
10 a motion in the nature of summary judgment, but let's have a
11 little discovery first to find out if there's a viable motion.

12 MR. BLACKMAN: Right. But the motions in limine, if I
13 understood the Court correctly, are due January 15th and expert
14 discovery isn't over --

15 THE COURT: Well, same is true about experts. It's
16 always assumed these days that there are experts. I don't know
17 what -- is there going to be an expert to determine whether in
18 fact somebody got bribed, a government official, and as a
19 result of that took away somebody's license and gave it to
20 somebody else? You wouldn't need an expert to tell you that.

21 MR. BLACKMAN: I agree.

22 THE COURT: So, you know, that too, the whole expert,
23 you know, enterprise -- sure, maybe there is need for some
24 expert here, but I don't assume that there is. I assume that
25 if you all step on the gas, this schedule is viable.

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1 MR. BLACKMAN: If I could just speak to one more
2 issue --

3 THE COURT: Sure.

4 MR. BLACKMAN: -- so the Court is not now left under a
5 misimpression. We have what we think is a very strong motion
6 to dismiss on the face of the complaint, but we also firmly
7 believe, at least from for my client, and here I'm speaking for
8 my client, my client is totally adverse to BSGR on the bribery
9 issue.

10 But as to my client, we have done a lot of homework.
11 There actually has been some discovery, but more importantly,
12 we've done our own internal, and there is simply no factual
13 basis for the allegation that Vale joined into some kind of
14 secret conspiracy with BSGR in December 2008 when Rio Tinto
15 lost its concession, zero, zero.

16 THE COURT: Okay. So now we're arguing the motion for
17 summary judgment.

18 MR. BLACKMAN: Well, no, but I'm saying it
19 deliberately --

20 THE COURT: But let's take it one step at a time.
21 Let's make considerable progress and let's see where this leads
22 us and --

23 MR. BLACKMAN: I guess I would just leave with what
24 the Court said, that we can come back to you when we finish
25 fact discovery and --

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1 THE COURT: Well, indeed, you'll need to.

2 MR. BLACKMAN: Right.

3 THE COURT: Yes. Okay. Great to see you all.

4 Thanks.

5 MR. AUERBACH: Your Honor?

6 THE COURT: Yes.

7 MR. AUERBACH: Very briefly.

8 THE COURT: Oh, yeah.

9 MR. AUERBACH: Martin Auerbach for VBG defendants.

10 THE COURT: Yes.

11 MR. AUERBACH: I have sometimes observed that it takes
12 lawyers more time to say less, and given the schedule that we
13 are all working very hard to meet, I think it would do no
14 violence to that schedule if the defendants had one additional
15 week to get their brief shrunk down to the 30 pages your Honor
16 has set. And I've spoken with plaintiff's counsel and they
17 have no objection to shifting it by one week.

18 THE COURT: You got it.

19 MR. AUERBACH: Thank you.

20 MR. LYLE: Your Honor, Michael Lyle for the plaintiff
21 Rio Tinto. Just one point of clarification. We want to make
22 sure we understood your order.

23 THE COURT: Sure.

24 MR. LYLE: As we read it, with respect to your
25 decision as it relates to discovery, are we correct that merits

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1 discovery should proceed against all defendants even those that
2 intend to file the motion to dismiss --

3 THE COURT: I think so, yes.

4 MR. LYLE: -- for subject matter -- for personal
5 jurisdiction?

6 THE COURT: Yes. That was -- there was a specific
7 reference in my order to not contingent upon, that's what I had
8 in mind.

9 MR. LYLE: Thank you, your Honor.

10 THE COURT: You bet.

11 MR. FILARDO: Your Honor, good morning, Vincent
12 Filardo from Mishconde Reya New York on behalf of defendants
13 BSG Resources and Benjamin Steinmetz.

14 Your Honor, just one point of clarification. We have
15 been conducting and have completed jurisdictional discovery
16 under the auspices of Judge Peck's court. Judge Peck ordered
17 that Mr. Steinmetz submit a declaration in lieu of the specific
18 general jurisdiction allegations that were in the amended
19 complaint. They had to do with allegation that he owned and/or
20 used certain real property here in the City.

21 THE COURT: Right.

22 MR. FILARDO: We have submitted that as part of our
23 discovery, and also anticipation of the motions that we've been
24 discussing here, specifically our 12(b)(2) motion.

25 THE COURT: Sure.

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1 MR. FILARDO: That is a declaration. Your Honor's
2 order that was issued on 16th of January requires that only one
3 affidavit be submitted. We'd ask that that one affidavit be
4 limited to attorney's affidavit since we do have this Steinmetz
5 affidavit that goes to the jurisdiction issues?

6 THE COURT: No, no. It is what it is. I mean, I
7 don't know where that affidavit is for Judge Peck or whatever
8 context that is. But I'm serious about the page limitations
9 and I think they're generous enough and adequate enough.

10 MR. FILARDO: Your Honor, that affidavit, just for
11 clarification, is literally a one and a half page affidavit
12 that says we don't own this property. That was directed --

13 THE COURT: Okay. So that would undoubtedly be baked
14 into your motion, I would think.

15 MR. FILARDO: Correct, correct, your Honor. We could
16 attach that, that it's --

17 THE COURT: I don't know how you're going to present
18 it. I think I set forth a format. But we're talking about one
19 affidavit of up to 12 pages, double spaced, normal margins, et
20 cetera. Thank you.

21 MR. BLACKMAN: Your Honor, just one other -- I'm
22 sorry.

23 THE COURT: Yes.

24 MR. BLACKMAN: What Mr. Filardo said just reminded me
25 of what I think is probably just housekeeping in this context.

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1 The motion to dismiss, as of course it is entitled to,
2 will talk a bit in maybe about two sentences about documents
3 that are alleged in the complaint, but not fully quoted in the
4 complaint. And normally one would present those to the Court
5 attached to a lawyer's affidavit. We're quite happy just to
6 attach them, but we need to have some guidance on that.

7 THE COURT: I'm not sure I get the --

8 MR. BLACKMAN: Well, for instance, the complaint talks
9 about certain communications and agreements between Vale and
10 Rio Tinto. And the text of those, the provision, what they say
11 and what they don't say is relevant to aspects of the motion to
12 dismiss. Normally one would, therefore, present them to the
13 court since they're not -- they're referenced and relied on but
14 not quoted in or attached as exhibits to the complaint. And
15 normally you just put it in a lawyer's affidavit saying here
16 they are. How would you like us to handle it?

17 THE COURT: So you're going to argue them as part of
18 your motion to dismiss --

19 MR. BLACKMAN: Yes.

20 THE COURT: -- the contents? Why don't you just quote
21 the parts that you're going to you feel support your --

22 MR. BLACKMAN: That's the -- I guess, yeah, okay. We
23 can do that, as long as the Court doesn't say you're -- if we
24 just quote them --

25 THE COURT: I don't have a problem --

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1 MR. BLACKMAN: -- as officers of the Court. That's
2 fine.

3 THE COURT: If there's some objection, you'll hear
4 about it --

5 MR. BLACKMAN: That's fine.

6 THE COURT: -- in response.

7 MR. BLACKMAN: We're happy to do it that way.

8 THE COURT: Okay, thanks.

9 MR. BLACKMAN: Thank you.

10 MR. LYLE: Thank you, your Honor.

11 (Adjourned)

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